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No. 91-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OMAHA INDIAN TRIBE, TREATY OF 1854, ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L. HAROLD, and LUEA SORENSON; STATE OF IOWA and IOWA DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, DC 20006
(202) 466-3890

Attorney for
Omaha Indian Tribe

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Whether Petitioner Omaha Indian Tribe, by the district court's judgment of dismissal with prejudice of Petitioner Tribe's claims to approximately 9400 acres, has been denied both its Constitutional right to Judicial Due Process, including a fair and full hearing before a fair tribunal, and likewise deprived of invaluable property rights by the district court's (a) failure to consider or to hold a hearing respecting Petitioner Tribe's fully documented motion and response, Appendix X, in opposition to Respondent's motions to dismiss with prejudice antecedent to the district court's entry of its May 7, 1990 memorandum and order pertaining to the dismissal with prejudice of Petitioner Tribe's claims; and (b) the district court's entry of its May 29, 1990 judgment of dismissal with prejudice without a hearing on Petitioner Tribe's motion and response or allowing Petitioner Tribe an opportunity to be heard or respond to the district court's May 29, 1990 *nunc pro tunc* memorandum purportedly in response to Petitioner Tribe's comprehensive motion and refutation of Respondents' motions to dismiss with prejudice?

Whether the Court of Appeals' gravely erroneous, aggressively biased, prejudiced, and hostile opinion attacking Petitioner Tribe's Counsel is not in itself a denial of Petitioner Tribe's Constitutional right to a full and fair hearing before a fair tribunal, calling for reversal?

Whether Petitioner Omaha Indian Tribe has been deprived of its Constitutional right to property and its right to a full and fair hearing before a fair tribunal by the affirmance of the Court of Appeals of the district court's "gag" order precluding Petitioner Tribe and its Counsel from referring directly or indirectly to Petitioner Tribe's charges that Evan L. Hultman, United States Attorney, and Myles E. Flint, Attorney, Department of Justice, acting in closest concert with and on behalf of Respondent State of Iowa and other Respondents, fraudulently forced their rejected representation upon Petitioner Tribe when

Petitioner Tribe was represented by Counsel of its own choice and over Petitioner Tribe's objections:

(1) Hurriedly prepared and filed without preparation a complaint fraudulently constricting Petitioner Tribe's claims of 11,300 acres to 1900 acres; and

(2) Prior to the time Evan L. Hultman forced his representation upon Petitioner Tribe, Mr. Hultman, as Attorney General, had previously represented the State of Iowa in the Supreme Court of the United States and in state court litigation involving identically the same tracts of land claimed by Petitioner Tribe which Mr. Hultman abandoned by filing the constricted complaint, thereby vastly benefiting his former client, Respondent Iowa?

Whether Petitioner Omaha Indian Tribe has been deprived not only of its invaluable property but likewise to its Constitutional right to a full and fair hearing before a fair tribunal due to the affirmance by the Court of Appeals of the district court's judgment of dismissal with prejudice of Petitioner Tribe's valid claims to title to approximately 9400 acres of land, when, in the words of the Appellate Court, "the primary fault of the dismissal can be traced to the recalcitrance and defiance. . . ." of Petitioner Tribe's Counsel?

Whether the Supreme Court in exercising its appellate jurisdiction should not fully investigate and determine whether there was serious dereliction on the part of the district court and the Court of Appeals in failing promptly to hear and dispose of Petitioner Tribe's fully documented charges of forced, fraudulent representation and, if Petitioner Tribe and its Counsel failed to prove their charges, then the district court and the Court of Appeals were obligated immediately to take disciplinary action against Counsel, proceeding thereafter to a final disposition of Plaintiff Tribe's claims to title?

LIST OF PARTIES

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed:

Agricultural & Industrial Investment Co., John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources.*

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* See full list of all Respondents in Appendix F, pp. 40a, et seq.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Omaha Indian Tribe of Nebraska respectfully prays the Court that a writ of certiorari issue to review the opinion of the Court of Appeals for the Eighth Circuit which was rendered on May 28, 1991, and a timely petition for rehearing *en banc* filed June 11, 1991, having been denied by the Court of Appeals on July 31, 1991.

OPINIONS BELOW

The United States District Court for the Northern District of Iowa Western Division entered its Judgment of May 29, 1990, Appendix A, dismissing with prejudice Petitioner Omaha Indian Tribe's claim to approximately 9400 acres of land, in the unconsolidated portion of Case No. C 75-4067 predicated upon the district court's May 7,

1990 Memorandum and Order on Plaintiff's Proposed Pretrial Order and on Defendants' Motions to Dismiss, Appendix B; May 7, 1990 Memorandum and Order on Sanctions Regarding Pretrial Conferences of August and September, 1989, Appendix C; May 29, 1989 Order on Sanctions, Appendix D; and May 29, 1989 Memorandum and Order on Sanctions Pursuant to the May 15, 1990 Hearing, Appendix E. Petitioner Omaha Indian Tribe appealed the District Court's May 29, 1990 final judgment of dismissal with prejudice and the Memoranda and Orders upon which the judgment of dismissal with prejudice were predicated. The Court of Appeals rendered its opinion on May 28, 1991,[1] Appendix F. Petitioner Tribe's motion for a rehearing *en banc* was denied on July 31, 1991, Appendix G. In response to Petitioner Tribe's motion for a stay, the Court of Appeals issued its order of August 21, 1991, staying the mandate to and including September 21, 1991, and continuing the stay if within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, and continuing the stay until final disposition of the case by this Court, Appendix H.

Reference is made to the opinions pertaining to Tract 1, Blackbird Bend Meander Lobe, as they pertain to the constricted area within the complaint in *United States v. Wilson*, C 75-4024 which complaint was prepared by Myles E. Flint of the Department of Justice and filed by the then United States Attorney, Evan L. Hultman, over the protests of Petitioner Tribe.[2]

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[1] 933 F.2d, 1462 (CA 8, 1991).

[2] On June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix I of this Petition; *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix J of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978).

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on May 28, 1991; the Order denying Petitioner Tribe's motion for rehearing *en banc* was entered July 31, 1991. By an Order dated August 21, 1991, the mandate was stayed until September 21, 1991, with the further condition that the stay would be maintained if Petitioner Tribe filed its Petition for Certiorari by September 21, 1991. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

There is graphically displayed on Plate I below the area in litigation which is referred to as the "unconsolidated" phase of Petitioner Tribe's action to quiet title.

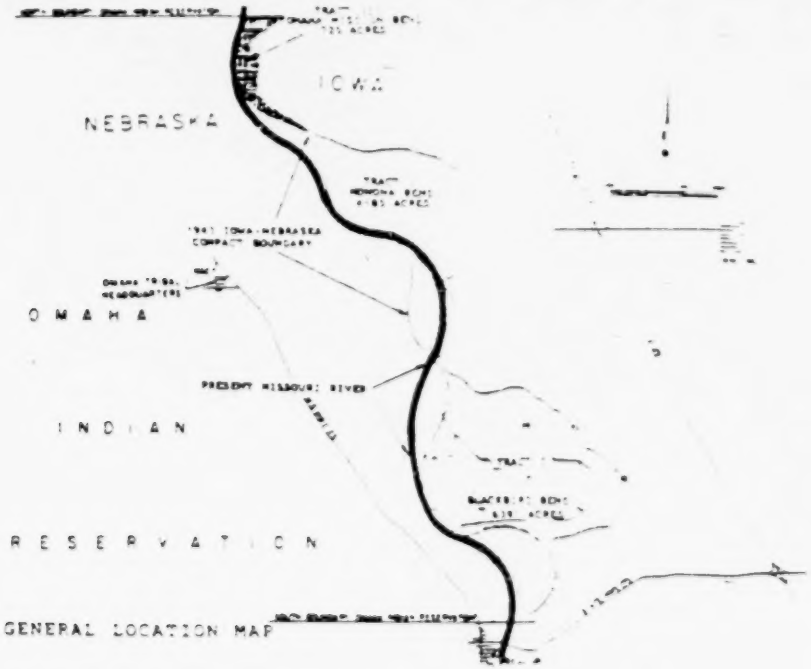

PLATE I

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Article VI.

This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Law of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment [V.], Rights of Persons

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. Sec. 476. Organization of Indian tribes; constitution and by-laws; special election.

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by laws. . . .

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel. . . .

28 U.S.C. 1362. Indian Tribes

The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Federal Rules of Civil Procedure

Rule 16. Pretrial Conferences; Scheduling Management

Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just,and among others any of the orders provided in Rule 37(b)(2)(B), (C), (d). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

Rule 41. Dismissal of Actions

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the fact and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render an judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 38. Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner Omaha Indian Tribe, Omaha Indian Reservation, Macy, Nebraska, is a duly organized Indian Tribe, recognized by the Secretary of the Interior in accordance with 25 U.S.C. Sec. 476 Petitioner Tribe on October 6, 1975, filed its Compliant in *Omaha v. Agricultural & Industrial Investment Co.; John R. Boulden, Matila Boulden, Vasco Bolen, Cleo Cox, John K. Crawford, Ruth Crawford, Alma Schmidt Henderson, Bertha Kirk, John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources, et al.*, in the United States District Court for the Northern District of Iowa, Western Division, C 75-4067.[3]

Jurisdiction of District Court: Petitioner Omaha Indian Tribe initiated its action to quiet title to 11,300 acres of land pursuant to the provisions of 28 U.S.C. 1362, which among other things declares that an Indian Tribe in the status of Petitioner, may initiate civil actions of the nature here involved arising "... under the Constitution, laws, or treaties of the United States."

PETITIONER TRIBE SEEKS REVIEW OF COURT OF APPEAL'S AFFIRMANCE OF DISTRICT COURT'S ORDER (1) PRECLUDING REFERENCE BY PETITIONER TRIBE TO FORCED FRAUDULENT REPRESENTATION AND (2) DISMISSING WITH PREJUDICE PETITIONER TRIBE'S CLAIM TO 9400 ACRES OF LAND

Petitioner Omaha Indian Tribe seeks review of the May 28, 1991 opinion of the Court of Appeals for the Eighth Circuit[4] which (a) affirmed the district court's Judgment

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[3] *See*, Appendix K. Complaint *Omaha v. Agricultural, ... State of Iowa, et al.*, C 75-4067 in United States District Court for Northern District of Iowa, Western Division.

[4] Appendix F.

of May 29, 1990,[5] which was predicated upon the memorandum and orders of May 7,1990[6] and May 29, 1990;[7] and (b) the October 5, 1989[8] Order entered by Judge McManus "... prohibiting Plaintiff from referring to its fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan Hultman, as well as any reference to a 'constricted complaint' or any other direct or indirect reference to its fraud claim...."

CERTIFICATE OF COUNSEL FOR PETITIONER OMAHA INDIAN TRIBE
WILLIAM H. VEEDER

(1) I, William H. Veeder, attorney for Petitioner Omaha Indian Tribe, as a member in good standing of the bar of the Supreme Court of the United States, deny each and all of the false, indeed felonious, charges made against me by the United States Court of Appeals for the Eighth Circuit, Chief Judge Lay speaking for that Court, and affirmatively answer the infamous, false, and fabricated charges.

(2) Though the opinion of the Court of Appeals, concerning which Petitioner Tribe seeks to have reviewed is replete with false statements and partial misstatements, I present here a chronicle of those misstatements which have as their sole objective the disparagement of Counsel and damage to Petitioner Tribe.

(a) Judge Lay, in his opinion declares:

> On June 6, 1989, after learning that the Tribe had failed to designate its experts, Magistrate Jarvey sanctioned the Tribe by limiting it to the expert opinions given at the first trial in the consolidated cases.[9]

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[5] Appendix A.

[6] Appendix B.

[7] Appendix E.

[8] Appendix V.

[9] Appendix F, p. 45a 933 F.2d 1462, 1465 (CA 8, 1991).

(b) When Judge Lay made that statement in his June 28, 1991 Opinion, he knew that the Magistrate's Order was in grave error and had been reversed on September 29, 1989;

c) Moreover, Judge Lay knew that on June 13, 1989, immediately following the June 6, 1989 Order, Petitioner Tribe filed its Emergency Motion[10] requesting the Magistrate to reverse the following sanctions because they were gravely in error.

> . . . the plaintiff shall be limited to the expert opinions given at the first trial as a sanction for failure to designate additional expert testimony.[11]

(d) Judge Lay likewise knew that Petitioner Tribe's Emergency Motion was pending from June 13, 1989 to September 29, 1989, and that Petitioner Tribe was precluded from offering expert evidence in regard to areas in Blackbird Bend outside the Barrett Meander Line, Monona Bend, and Omaha Mission Bend, approximately 9400 acres.

(e) Irrespective of the impost against offering testimony in regard to Petitioner's claims in the forthcoming trial, Petitioner Tribe was ordered by the Magistrate on August 18, 1989 ". . . to submit a proposed final pretrial order to him by September 1, 1989, and scheduled a final pretrial conference for September 8, 1989."[12]

(f) Those pretrial conferences and the requirements for a final pretrial order were imposed upon Petitioner Tribe when the sanctions precluded Petitioner Tribe from offering expert testimony in support of its claimed title to approximately 9400 acres. Thereafter Judge Lay likewise knew that Petitioner Tribe could not agree to any facts pertaining to its claims to 9400 acres by reason of the fact that those claims were all predicated upon expert

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[10] Appendix P.

[11] Appendix O, p. 162a, 165a.

[12] Appendix F, p. 45a.

opinions, which were prohibited by the sanctions, as that testimony pertained to the morphology of the Missouri River.

(g) Finally, having castigated Petitioner Tribe and its Counsel for refusing to agree to any facts pertaining to river morphology, Judge Lay admits that on September 29, 1989 Judge McManus reversed Jarvey's June 6, 1989 Order prohibiting Petitioner Tribe from offering expert evidence, all as prayed for by Petitioner Tribe on June 13, 1989.[13].

(h) Judge Lay likewise continued his attack in regard to the pretrial conferences of August 22-23, 1989, challenging Counsel's conduct in which Counsel refused to agree to any facts while under the impost of the sanctions of June 6, 1989. In launching that attack, Judge Lay quotes from Judge McManus who stripped from context this statement by Counsel, speaking on behalf of Petitioner Tribe, in which Counsel states: 'I never agreed on anything in 13 years. We'll just go ahead that way."[14] By that statement in context, Counsel was commenting on behalf of Petitioner Tribe respecting an erroneous statement proposed by opposing Counsel. The full statement from which the excerpt was stripped from context is as follows:

> When I read that, I knew that we were going to contest—I knew that there was no way that you were going to back off from the position you took in the original case. Now, here is my feeling, you understand where I am on this. I'll submit to you my facts. You submitted to us your facts. We'll present them to the Court and say, "There has never been agreement among us on this matter, and this is the way the matter stands in the record. . . . I said what I think you ought to do is submit this to the Court. I'll submit my statement to the Court. And it's not the first time that people couldn't agree on anything. I'll just let it

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[13] Appendix P.

[14] Appendix F, p. 47a.

> go that way, Pete. I never agreed on anything in 13 years. We'll just go ahead that way.[15]

(3) I, moreover, certify that the attack by Judge Lay upon me respecting the discovery processes and the preparation of the pretrial order is manifested by this equally false and fabricated charge that:

> [Mr. Veeder] ". . . stands obsessed with the charges of fraud against the government and the complicity in such fraud by Judges McManus and Urbom. He maintains this charge notwithstanding this Court's prior dismissal of such a claim."[16]

(4) I deny that I have ever at any time charged the "government" of the United States with fraud. I certify that my initial and documented charges of fraud were directed against Evan L. Hultman, United States Attorney, and Myles E. Flint, Attorneys Department of Justice, individually.

(5) Evan L. Hultman, as United States Attorney, on May 19, 1975 filed the fraudulent and contrived complaint in the case of *Untied States v. Wilson, State of Iowa, Lakin, R.G.P., Inc. [Raymond G. Peterson], et al.*[17] Evan L. Hultman, had, as Attorney General for Respondent Iowa, repeatedly represented Respondent Iowa in state court litigation involving land title to which resides in Petitioner Tribe.

(6) I certify that Evan L. Hultman, by constricting Petitioner Tribe's claim to 1900 acres in the Blackbird Bend Area preserved and protected the interests of his former client, Respondent Iowa, by abandoning Petitioner Tribe's valid claims to an additional 4400 acres for the benefit of Respondent Iowa, Respondent R.G.P., Inc., [Raymond G. Peterson], and Respondent Lakin with whom Evan L. Hultman, by amicable arrangements with those

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[15] Appendix S, p. 190a-192a.

[16] Appendix F, p. 56a-57a.

[17] Appendix L.

Respondents, divided up virtually the entire 6390 acres of the Blackbird Bend Meander Lobe among those Respondents.

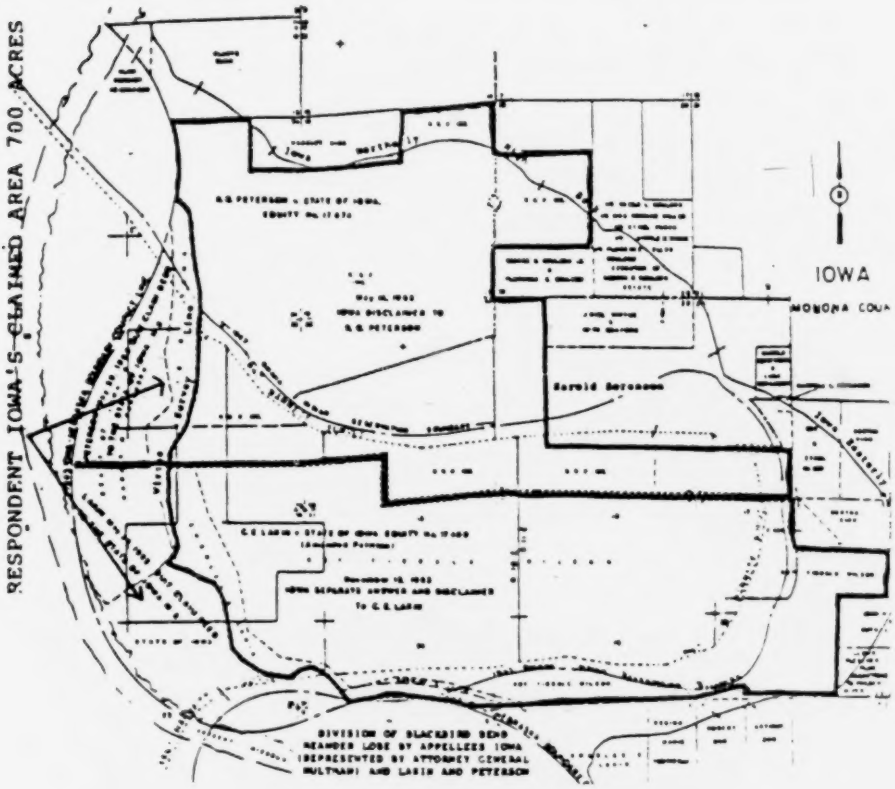

PLATE II
APPORTIONMENT AMONG RESPONDENTS OF BLACKBIRD BEND MEANDER LOBE WITH RESPONDENT IOWA REPRESENTED BY EVAN L. HULTMAN

(7) I certify, moreover, that Evan L. Hultman, as Attorney General for Respondent Iowa appeared in the case of *Nebraska v. Iowa*[18] and answered Nebraska. In the course of the case of *Nebraska v. Iowa*, Respondent Iowa made the following claims:

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[18] 406 U.S. 117 (1972).

> BLACKBIRD-TIEVILLE BENDS: (1) Copies of pleadings and documents in *Lakin v. Iowa*, 17400, Monona County, Iowa, District Court [in which Evan L. Hultman appeared]; (2) Copies of pleadings and documents in *Peterson v. Iowa*, 17674, Monona County, Iowa, District Court [in which Evan L. Hultman appeared].[19] (See Plate preceding page)

(8) I further certify that contemporaneously with the assault on Petitioner Tribe and its Counsel, Respondent State of Iowa filed its motion in limine petitioning the district court, Judge McManus presiding, to enter an order prohibiting Petitioner Tribe and its Counsel and ". . . its witnesses and all agents, employees and representatives to refrain from communicating to the jury in any way the 'fraud issue' or the 'constricted complaint' issue, including but not limited to voir dire, opening statement during testimony or in closing argument."[20]

(9) Petitioner Tribe immediately filed an in-depth opposition to Respondent Iowa's request for a "gag" order, asserting that it had the Constitutional right to a full and fair hearing respecting the fraud charges and that it had been effectively denied its repeated efforts to be heard in regard to those fraud charges.[21]

(10) I certify that Judge McManus granted Respondent Iowa's motion in limine using this constrictive language:

> [Respondent State of Iowa, et al.,] seek an order prohibiting plaintiff from referring to its fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan Hultman, as well as any reference to a 'constricted complaint' or any other direct or indirect reference to its fraud claim. Both this Court and the Court of Appeals have found the Tribe's fraud claim to be wholly without merit. The motions in limine shall be granted.[22]

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[19] Appendix N.

[20] Appendix T, p. 195a.

[21] Appendix U.

[22] Appendix V, p. 220a.

(11) I certify that Counsel, confronted with Judge McManus' "gag" order and the constricted nature of that order, left Counsel with the sole option of preserving the fraud issue for review by the Court of Appeals and here by setting forth the facts in the proposed pretrial order—in effect an "offer of proof." Counsel did not perceive himself to be either recalcitrant, defiant, or contumacious in insisting that the fraud issue and all aspects of that fraud issue be set forth in the proposed pretrial order, believing that there was no other way of preserving the issue in light of Judge McManus' "gag" order of October 5, 1989.

RESPONSE TO THE SPECIFIC CHARGES GIVING RISE TO THE JUDGMENT OF DISMISSAL WITH PREJUDICE

Counsel for Petitioner Tribe, by his preceding certificate of facts, has demonstrated the all-pervasive issue of forced, fraudulent representation in the case of *United States v. Wilson* by Evan L. Hultman, former United States Attorney, and the disaster experienced by Petitioner Tribe due to that fraudulent representation. The entry of the final judgment respecting the 1900 acres awarded to Petitioner Tribe does not in any degree remove from these cases the consequences of the Hultman fraud. Specifically all of the lands in the Blackbird Bend Meander Lobe, outside of the so-called Barrett Meander Line,[23] totaling 3500 acres, remain as stark proof of the consequences of that forced, fraudulent representation constricting Petitioner Tribe's valid claims.

Reference is initially made to the fact that on May 7, 1990, Judge Urbom entered his memorandum and order effectively dismissing Petitioner Tribe's claims with prejudice.[24] To Petitioner Tribe's charges that Judge Urbom, antecedent to his May 7, 1990 Order dismissing Petitioner Tribe's case with prejudice, Judge Urbom had never con-

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[23] *See* above Plate II, p. 12

[24] Appendix B.

sidered Petitioner Tribe's December 5, 1989 motion,[25] with full documentation, that answered in specific detail Respondents' motions to dismiss with prejudice. That failure on Judge Urbom's part to consider Petitioner Tribe's response to the motions to dismiss or to hear Petitioner Tribe in open court respecting that motion is admitted by Judge Urbom. Belatedly, on the date when he entered the judgment of dismissal, May 29, 1990, Judge Urbom purports to review Petitioner Tribe's motion of December 5, 1989.

That review by Judge Urbom is a grossly inadequate attempt to cloak the fact that, six months prior to his judgment of dismissal, Petitioner Tribe had refuted in detail each of the spurious charges of the Respondents. Petitioner Tribe's right to judicial due process includes a full and fair hearing respecting the December 5, 1989 motion and documentation. A belated and self-serving review of the motion by Judge Urbom is most assuredly not a substitute for a judicial due process.[26]

In responding to each of the grounds upon which Judge Urbom relied in dismissing with prejudice Petitioner Tribe's claim, reference is made to the Court of Appeals Opinion[27] in which it is stated that the first ground for dismissal was that Petitioner Tribe had refused to stipulate to any undisputed facts in the proposed pretrial order, and to demonstrate Petitioner Tribe's alleged recalcitrance, reference is made to Judge Urbom's statement that: "The Tribe would not even agree that the Tribal Council governs the Omaha Indian Tribe, or that the state of Iowa was admitted to the Union by an act of Congress on December 28, 1846."[28]

Counsel states that there is no precedent, statutory, decisional or otherwise, declaring that in complex litigation

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[25] Appendix X.

[26] Infra., p. 19-22.

[27] Appendix F. p. 40a.

[28] *Ibid.*, p. 53a-54a.

a party would be dismissed from the litigation by reason of the inadvertent statement in the Pretrial Order made by a staff person employed by Counsel that Petitioner Tribe did not agree with the particularly innocuous declaration by one of the parties that Petitioner Tribe was governed by a Tribal Council or that Respondent Iowa had not been admitted to the Union.

In the above mentioned December 5, 1989 Motion, ignored by Judge Urbom, there is fully reviewed in detail that Counsel for Petitioner, without any previous warning, was advised by Magistrate Jarvey on October 6, 1989, that he was required three days later to appear in Sioux City, Iowa, together with five of his expert witnesses to appear for depositions during which period the pretrial order was in the process of preparation, due October 15, 1989 and the inadvertent mistake was made by the office staff in the final assembly of the pretrial order. Once again reference is made to the December 5, 1989 motion[29] for a full explanation of that inadvertent mistake.

Reference is next made to the statement by the Court of Appeals that: "Second, the Tribe's statement of legal issues was inadequate because it contained the fraud allegation." The Court of Appeals then states that the fraud issue ". . . was without merit," adding, "[m]oreover, the district court's order dated October 5, 1989, specifically prohibited the Tribe from referring to the fraud claim."[30] That quoted excerpt from the opinion of the Court of Appeals places squarely in issue the predominate question presented here of whether Petitioner Tribe has the Constitutional right to be heard respecting the forced fraudulent representation by Evan L. Hultman, Respondent Iowa's former Attorney General who constricted Petitioner Tribe's valid claims to title for the benefit of his former client, Respondent State of Iowa.[31] The issue of forced,

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[29] *See*, Appendix X, p. 233a, *et seq.*, under the heading of "Defendants' False Charges Respecting the Taking of Depositions."

[30] Appendix F, p. 53a-54a.

[31] *See* Infra., p. 20, *et seq.*

fraudulent representation and the precedents supporting Petitioner Tribe's are subsequently reviewed.

Respecting Judge Urbom's third erroneous charge that Petitioner Tribe had failed to refer to six alleged avulsions, the Court of Appeals presents this summarization:

> Finally, the Tribe failed to disclose in its proposed pretrial order or its answers to interrogatories at least six avulsions in Omaha Mission Bend and Monona Bend."[32]

Failure of Judge McManus, while presiding, to hear or consider Petitioner Tribe's December 5, 1989 motion, and failure of Judge Urbom to hear or consider that motion, as repeatedly requested by Petitioner Tribe when the case was assigned to Judge Urbom, resulted in the erroneous charge that Petitioner Tribe had withheld information respecting avulsions which it intended to claim in the litigation. In the December 5, 1989 motion there is reviewed in detail the specific claims of Petitioner Tribe in regard to the avulsions upon which it is predicating its claims to title.[33] Chronicled in the December 5, 1989 motion is an in-depth scientific review, with documentation, with reference to the exhibits made available to Respondents for review and the predicate upon which Petitioner Tribe was claiming that the Missouri River moved by avulsions. It is controlling here that Judge Urbom, in the memorandum filed contemporaneously with the judgment dismissing with prejudice Petitioner Tribe's case, this comment is made respecting the avulsions:

> I have previously set out the six avulsions in my memorandum and order of May 7, 1990. . . . I do note that on pages 51 and 52 of this motion [December 5, 1989] Plaintiff Tribe describes 3 of the 6 avulsions of which it purports to have no knowledge.

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[32] Appendix F, p. 54a.

[33] Appendix X, p. 235a, *et seq.*,; p. 278a, *et seq. See* also Appendix Y, p. 284a, *et seq.*, Tribe's motion of March 13, 1990, requesting Judge Urbom to hear "Defendants' Motions to Dismiss with Prejudice."

Continuing, Judge Urbom having failed to hear Petitioner Tribe's December 5, 1989 motion, makes this biased and prejudiced and totally hostile statement:

> The plaintiff will not be allowed to benefit from its own concealment.[34]

That viciously biased statement ignores the fact that the Respondents and Judge Urbom had before them in the December 5, 1989 motion—six full months antecedent to the May 29, 1990 Order of Dismissal—Petitioner Tribe's statement as to its claimed avulsions and in that same motion stated that the Pretrial Order would be amended to include those avulsions. Petitioner Tribe rejects out of hand the concept that it should adopt three additional avulsions which it does not espouse, as demanded by Judge Urbom.

ARGUMENT

SUPPRESSION OF ALL REFERENCES TO THE FORCED, FRAUDULENT REPRESENTATION BY EVAN L. HULTMAN AND THE DENIAL OF PETITIONER'S RIGHT TO BE HEARD VIOLATES PETITIONER TRIBE'S CONSTITUTIONAL RIGHT TO DUE PROCESS

In these specific terms, Judge McManus in his October 5, 1989 Order, prohibited Petitioner Tribe ". . . from referring to its fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan Hultman, as well as any reference to a 'constricted complaint' or any other direct or indirect reference to its fraud claim."[35]

In dismissing with prejudice Petitioner Tribe's complaint in *Omaha v. Agricultural . . . State of Iowa, et al.*,[36] Judge Urbom makes this specific statement:

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[34] Appendix E, p. 33a.

[35] Appendix V, Judge McManus' Order of October 5, 1989, granting Respondent Iowa's request for "gag" Order, suppressing all references to the fraud issue and the fraudulent complaint in *United States v. Wilson*.

[36] Appendix K.

> The Plaintiff also raises the issue of whether the Tribe can be bound by the 'forced, fraudulent representation' of Evan Hultman and others, and whether Hultman 'sold out' the Tribe in the first case. This argument is frivolous . . . a motion in limine was granted October 5, 1989, prohibiting the plaintiff from referring to its fraudulent representation claims."[37]

Petitioner Tribe did in fact preserve the issue of the forced, fraudulent representation by Evan L. Hultman and Myles E. Flint, Department of Justice Attorneys, in the pretrial order.[38] The Court of Appeals, reiterating its earlier decision that Petitioner Tribe's ". . . fraud claim was without merit" and simultaneously suppressing all facts respecting that fraud, confirmed both Judge McManus' October 5, 1989 "gag" Order and Judge Urbom's May 29, 1990 Judgment of dismissal with prejudice.[39]

The Court of Appeals, in both suppressing all references to and denying Petitioner Tribe's right to be heard relative to the forced, fraudulent representation by Messrs. Flint and Hultman, violated the explicit precedents to the contrary of its hallmark decision of *Fiske v. Buder*.[40] In that case, the Court of Appeals declares that when, as here, ". . . [a client's] attorney fraudulently connives at his defeat or sell out his client's interests. . . . it is fraud of a character that will justify a court setting aside a judgment, irrespective of the lapse of time."

In the Court of Appeal's more recent case of *Arkansas v. Dean Foods Products Co.*,[41] there is extensively reviewed Canon 9 of the Code of Professional Responsibility declaring that "[a] lawyer should avoid even the appearance

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[37] Appendix B, p. 4a, Memorandum and Order on Plaintiff's Proposed Pretrial Order . . . May 7, 1990.

[38] Appendix Z, p. 321a, para. V, through p. 324a.

[39] Appendix A, p. 1a., Appendix B, p. 4a.

[40] 125 F.2d 841, 849 (Ca 8, 1942); *cert.den.* 273 U.S. 756 (1942).

[41] 605 F.2d 380, 384 (CA 8, 1979)

of personal impropriety." A principal aspect of Canon 9 is then quoted:

> EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Repeated decisions have stressed the qualities of integrity and fidelity so gravely violated by Messrs. Flint and Hultman.[42] In *Fiske v. Buder*,[43] citing *United States v. Throckmorton*, the court declared that:

> Where, as here, an attorney connives to sell out his client ". . . the fraud will vitiate any judgment which could be entered."[44]

In *United States v. Shotwell Manufacturing Co., et al.*, the Supreme Court reviewed fraudulent acts systematically practiced upon the district court, the Court of Appeals, and the Supreme Court itself, as here. The Court declared that corrective action was required: 'The integrity of the judicial process demands no less.'[45]

Fraud that strikes at the validity of a judgment, as here, can be raised at any time, particularly under the circumstance where Respondent State of Iowa's former Attorney General forced his representation upon Petitioner Tribe as an agent of the United States Trustee for Petitioner Tribe

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[42] *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491 499; 141 A. 866, 868 (1968); *T.C. Theater Corp. v. Warren Bros. Prictures*, 113 F.Supp 265, 268 (U.S.D.C.S.D.N.Y.1953); *Consolidated Theaters, Inc. v. Warner Bros.* 216 F.2d 920, 924 (CA 2, 1954); *In the Matter of Cipriano*, 68 N.J. 398, 346 A.2d 393 (1975). *See* Vol. 15, *Federal Practice and Procedure*, Sec. 3911; 1985 Supp., p. 245, et seq.

[43] 125 F.2d 841 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1942).

[44] *Fiske v. Buder*, 125 F.2d 841, 849 (Ca 8, 1942); *cert.den.* 273 U.S. 756 (1942).

[45] 355 U.S. 234, 240, 241 (1957).

and sold out Petitioner Tribe for the benefit of Respondents Iowa, Lakin, R.G.P., Inc., et al. That sell out moreover, was not limited to the constricted complaint in *United States v. Wilson*; it directly affected Petitioner Tribe's rights, title, and interest to 3500 acres of the Blackbird Bend Meander Lobe, title to which had been fully tried in the original case and concerning which Judge Urbom demanded that Petitioner Tribe retry all of the issues. When Petitioner Tribe sought to preserved the right to be heard respecting that retrial in the proposed pretrial order, Judge Urbom utilized that request by Petitioner Tribe as one of the grounds for the judgment of dismissal, using these terms: "The plaintiff's statement of legal issues is inadequate and contains allegations upon which this Court and the 8th Circuit has previously ruled. Specifically, Plaintiff alleges that it was improperly being forced to submit to a 'retrial' of the same issues. . . ."[46]

In the *Emle* Decision[47] the Second Circuit Court would not permit the issue of delay to preclude a party from raising charges of misconduct far less serious than the fully documented charges against Evan L. Hultman, declaring:

> . . . the court's duty and power to regulate the conduct of attorneys cannot be defeated by the laches of a private party or complainant.

It is impossible to perceive a more shocking violation of the judicial processes than the forced, fraudulent representation of Petitioner Tribe by Respondent Iowa's former Attorney General in the case of *United States v. Wilson, State of Iowa, et al.* That Judges McManus, and Urbom, and Chief Justice Lay—with knowledge of that misconduct by Respondent Iowa's former Attorney General—failed to take action in regard to it does not to any

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[46] Appendix B, Memorandum and Order on Plaintiff's Proposed Pretrial Order . . . May 7, 1991, p. 4a; Appendix A, Judgment of Dismissal with Prejudice.

[47] *Emle Industries v. Pantentex*, 478 F.2d 562, 574 (CA 2, 1973).

degree mitigate the damages experienced by Petitioner Tribe by reason of that fraud.

As the Supreme Court stated in *Hazel-Atlas*:

> '. . . tampering with the administration of justice . . . [which] is a wrong against the institutions. . . .'[48]

Adhering to the concepts of *Hazel-Atlas*, the Court of Appeals in *Virgin Island Housing Authority v. David*,[49] declared that:

> Since attorneys are officers of the court, their conduct, if dishonest, would constitute a fraud upon the court.

In *Moore*, there was extensively reviewed the concepts of *Hazel-Atlas*, declaring that, while an attorney should represent his client with singular honesty,

> '. . . his loyalty to the court, as an officer thereof, demands integrity and honest dealings with the court. And when he departs from standard, in the conduct of a case, he perpetrates a fraud upon the Court.'[50]

Counsel for Petitioner Tribe, in his certification of facts sets forth above, in an effort to counteract the aggressive hostility of Chief Judge Lay against Counsel, referred repeatedly to the fact that the attorneys in the Department of Justice—with full knowledge that Petitioner Tribe, acting through its own attorney,was preparing its own quiet title action—formulated and filed without preparation the constricted complaint in *United States v. Wilson*. Stressed by Counsel in that chronicle is the fact that both the district court and the Court of Appeals were fully aware that Petitioner Tribe had rejected that forced representation but, nevertheless, proceeded, by the orders reviewed above, to force upon Petitioner Tribe the representation

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[48] *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

[49] 823 F.2d 764, 767 (CA 3, 1987).

[50] Vol. 7, **Moore's Federal Practice**, 1987-88, Cumulative Supplement, Sec. 60.33, Fraud upon the Court, p. 60-359.

by the attorneys in the Department of Justice and adopted, over repeated objections by Petitioner Tribe, the constricted fraudulent complaint in *United States v. Wilson*.

Counsel for Petitioner Tribe believes that Congress by 25 U.S.C. 476, authorized Indians to employ their own counsel and by 28 U.S.C. 1362 authorized Petitioner Tribe to initiate its own action to quiet title, independent from the Department of Justice attorneys, conferring jurisdiction on the district court to have "original jurisdiction of all civil actions . . . wherein the matter in controversy arises under the Constitution, laws and treaties of the United States."

There is presented here for review the question of whether there was and is a clear violation of Petitioner Tribe's Constitutional right to Judicial Due Process by (1) the forcing upon Petitioner Tribe the rejected representation by the attorneys in the Department of Justice; and (2) forcing upon Petitioner Tribe the constricted fraudulent complaint in *United States v. Wilson*.

There is likewise presented the question of whether Judge Urbom denied Petitioner Tribe the right to judicial due process by the Memorandum and Order of May 7, 1990.[51] Petitioner Tribe was denied the right to have a full and fair hearing in regard to Petitioner Tribe's motion of December 5, 1989, in which Petitioner Tribe fully answered with complete documentation the very charges pursuant to which Judge Urbom dismissed Petitioner Tribe's case with prejudice.

Petitioner Tribe, after diligent review of the precedents, has been unable to find a decision similar to this case where there was not only forced representation by the Department of Justice, but where, as here, the Courts have denied Petitioner Tribe's repeated objections to the forced, fraudulent representation by the attorneys in the Department of Justice and where the courts have likewise suppressed Petitioner Tribe's right to be heard respecting its

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[51] Appendix B, p. 2a.

own case and, moreover, as charged, where the representation by the Department of Justice was not only forced but was fraudulent.

The aggressive attacks upon Petitioner Tribe's Counsel, who was endeavoring to preserve and protect Petitioner Tribe's right to be heard in a fair tribunal and to protect Petitioner Tribe's property rights, is the very essence of bias and prejudice in the courts.

It has been well stated that:

> Although there is no mechanical test, for determining when bias and/or hostility exists, when a trial judge exhibits the open hostility and bias at the beginning of a judicial proceeding [entry by Judge McManus of the *sua sponte* Order of April 5, 1976, constricting Tribe's claim[52] and the "gag" order of October 5, 1989][53] as was exhibited here, it follows that the judgment entered therein must be reversed.

further declaring that:

> '. . . when the judge joins sides, the public as well as the litigants become overawed, frightened and confused.'[54]

It has likewise recently been stated that:

> A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier *or unfairly hampering the presentation of the opposing party's claim or defense.*[55]

It is not even remotely doubtful that Respondents Wilson, Lakin and the State of Iowa, acting through Counsel,

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[52] Appendix M, p. 156a, 158a.

[53] Appendix V, Motion *in limine*, p. 219a.

[54] *Anderson v. Sheppard*, 856 F.2d 741, 747 (CA 6, 1988).

[55] *Aoude v. Mobile Oil Corp*, 892 F.2d 1115, 1118 (CA 1, 1989). (Emphasis Supplied)

brought pressure upon Myles E. Flint who acceded to the pressure when he—without knowledge, background, or preparation—formulated the fraudulent complaint in *United States v. Wilson* and sent it to Evan L. Hultman for filing.

In *Aoude*, from which the last quotation is taken, it is observed that "because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms." Thereafter it is stated, as if referring to the Flint-Hultman fraud:

> The only conceivable reason for *Aoude's* elaborate duplicity was to gain unfair advantage, first in the dispute, thereafter in the litigation.

The Court then states that Auode's tactics plainly hindered the opposition [Petitioner Tribe] in preparing and presenting

> . . . its case, while simultaneously throwing a large monkey wrench into the judicial machinery. In our view, this gross misbehavior constituted fraud on the court.[56]

In Aoude, quoting from *Hazel-Atlas Glass Co. v. Hartford-Empire Co*[57]. it is stated that:

> All in all, we find it surprisingly difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process—to combat those who would dare to practice unmitigated fraud upon the court itself.

Hazel-Atlas, previously cited, contains the basic principles of law controlling here:

> . . . even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only

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[56] *Ibid.*, p. 118-119.

[57] 322 U.S. 238, 246 (1944).

> private parties . . . tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligency of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of the deception of fraud.[58]

In the last-quoted excerpt, the Court refers to the imperative necessity of the "preservation of the integrity of the judicial process." It is respectfully urged to the Court that the unvarying violations of judicial integrity by both the district court and the Appellate Court by ignoring Petitioner Tribe's repeated charges respecting the forced, fraudulent, representation, particularly by Evan L. Hultman, and the suppression of any reference to either Hultman or the constricted complaint is a clear violation of judicial integrity.[59]

A critical aspect of the violations of Petitioner Tribe's rights to Judicial Due Process by both the district court and the Court of Appeals has been the denial of Petitioner Tribe's right to be represented by counsel of its own choice in the action initiated by the Tribe on its own behalf. Moreover, Petitioner Tribe is entitled to prosecute that action for its own best interests and neither the Department of Justice nor the courts should be permitted to veto the Tribe's will in that matter or the will of Congress which authorized Petitioner to initiate its own quite title action and specifically conferred jurisdiction on the district court to entertain Petitioner Tribe's action.

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[58] *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

[59] Appendix V, p. 217a.

In *Goldberg v. Kelly*[60], there is reviewed in detail the explicit determination by the Supreme Court that a person receiving benefits from the Congress could not be deprived of those benefits without violation of the Constitutional rights to Due Process. The issue there is stated in these terms:

> The Constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before termination of the benefits.

It must be remembered that the rights conferred by Congress on Petitioner Tribe to bring its own law suit, represented by its own legal counsel was effectively denied by Judge McManus' *sua sponte* order and the right to be heard was denied by his "gag" order over the strenuous protests of Appellant Tribe.

In the previously cited *Anderson v. Sheppard* Decision, the Sixth Circuit declared that:

> . . . the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized.[61]

In *Powell v. Alabama*, the Supreme Court rendered the decision which, it is believed, is controlling here. There, the Court declared that:

> . . . if in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[62]

There has been chronicled above the grave misstatements made by the district court and relied upon by the

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[60] 397 U.S. 254, 260 (1969).

[61] 856 F.2d 741, 747 (1988).

[62] 237 F.2d 245 (1932).

Court of Appeals in its opinion respecting Petitioner Tribe and its Counsel.[63] Reference has likewise been made to Petitioner Tribe's December 5, 1989 opposition to Respondents' motions to dismiss with prejudice. The district court ignored totally Petitioner Tribe's line-by-line refutation of Respondents' motions to dismiss with prejudice.[64] In Petitioner Tribe's in-depth motion and response there is likewise a full refutation of each of the three grounds for dismissal upon which the district court relied.[65]

The law relied upon by the district court and the Court of Appeals for dismissal with prejudice[66] have no application here, where both the district court and the Court of Appeals made grave errors respecting Petitioner Tribe's Constitutional right to a full and fair hearing before a fair tribunal.

CONCLUSION

The issue of the forced, fraudulent representation by Evan L. Hultman, Respondent Iowa's former Attorney General, has never been controverted. Petitioner Tribe's insistence that the issue of forced, fraudulent representation be fully tried and disposed of by a fair tribunal is the very essence of Petitioner Tribe's assertion here that both the district court and the Court of Appeals have violated Petitioner Tribe's Constitutional right to judicial due process. Indeed, the judgment dismissing Petitioner Tribe's case in *Omaha v. Agricultural, State of Iowa, et al.*, is directly attributable to the Flint/Hultman fraud.

Counsel for Petitioner Tribe, in chronicling in detail the consequences of that fraud and the acceptance of the fraud by the courts themselves, now petitions this Court, on behalf of Petitioner Tribe in the exercise of its appellate

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[63] Supra., p. 8, *et seq.*

[64] Appendix X, p. 233a, *et seq.*, p. 242a *et seq.*; p. 270a-275a.

[65] Appendix B, p. 2a-4a, *et seq.*

[66] Appendix F, p. 51a, under the heading of "B. Dismissal with Prejudice, *et seq.*

and supervisory jurisdiction, to reverse the May 28, 1991 Opinion of the Court of Appeals and to order a full and fair hearing in a fair tribunal of Petitioner Tribe's charges as reviewed and documented in this petition.

Respectfully submitted,

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WILLIAM H. VEEDER
818 18th Street, N.W.
Suite 920
Washington, DC 20006